INDEX

	Page
Petition for writ of certiorari	1
Statement of jurisdiction	1
Summary statement of matter involved	2
The questions presented	4
Reasons for granting writ	5
Brief of Petitioner	9
Opinion of Court below	9
Jurisdiction	9
Statement of the case	9
Specification of errors	10
Argument	10
Point A. Federal Court has jurisdiction based on diversity of citizenship, jurisdictional amount being present, notwithstanding omission of parties, if the court can do justice between the parties before it without injuriously affecting the rights of such absent parties. The "indispensability of parties" in Federal Courts is determined by Federal rules	10
Point B. State Procedure cannot affect substantive rights in Federal Courts and a state statute requiring action to be presented in the name of the real party in interest is not binding on Federal Courts	10
Conclusion	18

Cases Cited

Atwood et al. v. *National Bank of Lima,* 115 F. 2d 861 (C. C. A. 6th, 1940)	6, 13
Borer v. *Chapman,* 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532	6
Costephens et al. v. *Dean et al.,* 69 Ala. 385	7, 16
D. Korwin v. *First National Bank of Chicago et al.,* 156 F. 2d 858 (C. C. A. 7th, 1946)	6

Dugger v. *Tayloe*, 60 Ala. 504 ..... 7, 15
Ex Parte Baker, 118 Ala. 185, 191, 23 So. 996 ..... 7, 17
Faulk v. *Money*, 236 Ala. 69, 181 So. 256 ..... 7, 16
Horn v. *Lockhart*, 84 U. S. (17 Wall.), 21 L. Ed. 657 (1873) 6, 11
Oxley et al. v. *Sweetland*, 94 F. 2d 33 (C. C. A. 4th, 1938) 6, 13
Payne v. *Hook*, 74 U. S. (17 Wall.), 425, 19 L. Ed. 260 (1869) 6, 11
Princess Lida v. *Thompson*, 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. Ed. 285, 292 6
Roos v. *Texas Co.*, 23 F. 2d 171 (C. C. A. 2nd, 1927) 6
Ross v. *Beacham*, 33 F. Supp. 3 14
Seeley et al. v. *Cornell et al.*, 74 F. 2d 353 (C. C. A. 5th, 1935) 6, 13
Small v. *Frick*, D. C. S. C., 40 F. Supp. 778 15
Sutton v. *English*, 246 U. S. 199, 38 S. Ct. 254, 62 L. Ed. 664 6
Texas Company v. *Wall*, 107 F. 2d 45, 50 (C. C. A. 7th, 1939) 6, 14
Trotter v. *Brown*, 232 Ala. 147, 150, 167 So. 310 ..... 7, 18
Waterman v. *Canal-Louisiana Bank and Trust Co. et al.*, 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909) 6, 11
Williams v. *Crabb et al.*, 117 Fed. 193, 40 L. R. A. 125 (C. C. A. 7th, 1902) 6, 12

STATUTES CITED

Code of Alabama 1940, Title 61, Section 165 ..... 2, 17
Code of United States, Title 28, Section 1254 (28 U. S. C. A. Section 347) 2, 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 688

NOBLE C. POWELL,

Petitioner,

vs.

ROWLAND W. YOUNG,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Noble C. Powell, respectfully petitions this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the decision of said court rendered on the 10th day of January, 1950. The mandate and enforcement of the judgment of the Court of Appeals was on, to-wit, January 30, 1950, stayed for sixty days pending filing of petition in this Court.

The opinion sought to be reviewed is Noble C. Powell,

complainant v. Rowland W. Young, respondent, in the record herein page 495.

This Court has jurisdiction to review said decision under Title 28, U. S. Code, Section 1254 (28 U. S. C. A. Section 347).

The local statute involved is Section 165, Title 61, Code of Alabama, 1940, providing for appointment of administrator ad litem in any proceeding where estate of a deceased person must be represented and executor or administrator is adversely interested, and is set out on page 17 of brief in support of this petition.

Summary Statement of Matter Involved

This is an action at law brought in the District Court of the United States for the Northern Division of the Middle District of Alabama by Noble C. Powell, petitioner, against Rowland W. Young, respondent herein, to have certain gifts of personalty and a deed to realty set aside and declared to be null and void and of no effect, made by the deceased donor to respondent, on the ground of undue influence and mental incapacity.

This case challenges the right of a citizen and resident of the State of Maryland, one of the residuary legatees of a will admitted to probate in Alabama, to sue a citizen and resident of the State of Alabama, who is also a residuary legatee under the same will, in the Federal Courts of Alabama to set aside a gift of personalty in the sum of $44,000.00 and a deed to realty consisting of 325 acres of land without joining the personal representative of the deceased donor's estate and without joining the other heirs and legatees of said estate. The respondent is also the donee and the personal representative, but he was not sued in his representative capacity.

Petitioner filed suit against respondent in the District

Court of the United States for the Northern Division of the Middle District of Alabama alleging diversity of citizenship and the requisite amount in controversy. The complaint averred the death of the donor leaving a last will and testament and an estimated estate of around $75,000. The names, ages, residences and conditions of the other devisees and legatees under the will of the deceased donor were set forth in the complaint but they were not made parties to the suit.

The complaint alleged that (1) the gift of $44,000.00 and the deed to the real estate to respondent were made while the deceased donor was of unsound mind, and (2) that the gift and deed were products of undue influence exerted upon the deceased donor by the donee, the respondent in the action.

The prayer of the bill sought a decree invalidating the alleged gift of $44,000.00 and cancellation of the deed and that these assets be paid to the estate for distribution under the provisions of the said will—the estate being open and pending in the Probate Court of Lowndes County, Alabama (R. 2-20).

The respondent moved to dismiss the action on several grounds all adding up to (1) want of indispensable parties whose joinder would destroy diversity and deprive the court of jurisdiction and (2) petitioner was not the proper party to bring the action as the law of Alabama gave the cause of action solely to the personal representative (R. 21-23).

The District Court denied respondent's motion to dismiss the action and decreed that the bringing in of the absent parties, made the basis of the motion, would deprive the court of jurisdiction. The District Court held that a bill of complaint should not be dismissed because other parties have not been made parties to the controversy,

if the issues between the parties before the court can be adjudicated without adversely affecting the rights of the absent parties and decreed that petitioner was the proper party to bring this cause of action and that there were no other indispensable parties to the action (R. 23-25).

The cause then came on for hearing on its merits and resulted in a decree invalidating the gift of $44,000.00 and the cancellation of the deed to the realty upon the ground of undue influence exerted upon the donor by respondent, and the respondent was directed to pay these assets to the estate for distribution in accordance with the terms and provisions of the last will and testament of the deceased donor of which estate he is the executor (R. 481-488).

Respondent gave notice of appeal to the Circuit Court of Appeals for the Fifth Circuit under Rule 73(b) and executed a supersedeas and appeal bond in the sum of $30,000.00 (R. 488-490).

Upon submission of the cause in the United States Court of Appeals for the Fifth Circuit on October 19, 1949, the Circuit Court rendered a judgment or decision reversing the judgment or decision of the District Court and dismissed the cause for want of jurisdiction on the twofold ground that (1) the cause of action did not belong to petitioner and (2) absence of indispensable parties whose joinder would destroy diversity and oust federal jurisdiction (R. 495). The Court of Appeals did not reach the merits of the controversy.

The Questions Which Are Presented for the Supreme Court's Consideration:

1. Whether local rules control the constitutional right of a citizen of Maryland to sue a citizen of Alabama in the United States Courts in Alabama.

2. Whether or not Federal jurisdiction is determined by federal rules rather than state rules.

3. Whether or not the question of indispensability of parties is a matter controlled exclusively by Federal rules when suing in the Federal Courts.

4. Whether the real party in interest rule of local law controls actions in Federal Courts.

Reasons for Granting the Writ

A

1. The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in conflict with the principles established by the decisions of this Court.

2. The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in conflict with the decisions of the Circuit Court of Appeals for the Second, Fourth, Fifth, Sixth and Seventh Circuits.

3. The Circuit Court of Appeals for the Fifth Circuit in the instant case has decided an important question of local law in a way probably in conflict with applicable local decisions.

4. The decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case closes the door of the Federal Courts to citizens of other states under the diversity clause of the Federal Constitution and statutes governing jurisdiction because of a misconception of the principles established by the decisions of this Court and the decisions of the Circuit Court of Appeals for the Second, Fourth, Fifth, Sixth and Seventh Circuits and because of a misconception of local laws and rules.

B

1. The decision in the present case is in conflict with and contrary to the principles established by the following decisions of this Court:

Payne v. *Hook,* 74 U. S. (17 Wall.) 425, 19 L. Ed. 260 (1869);

Horn v. *Lockhart,* 84 U. S. (17 Wall.), 21 L. Ed. 657 (1873);

Waterman v. *Canal-Louisiana Bank and Trust Co. et al.,* 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909);

Princess Lida v. *Thompson,* 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. Ed. 285, 292;

Sutton v. *English,* 246 U. S. 199, 38 S. Ct. 254, 62 L. Ed. 664;

Borer v. *Chapman,* 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532.

2. The decision of the Circuit Court of Appeals in the present case is also in conflict with the decisions of the Circuit Court of Appeals for the Second, Fourth, Fifth, Sixth and Seventh Circuits in the following cases:

Roos v. *Texas Co.,* 23 F. 2d. 171 (C. C. A. 2nd, 1927);

Oxley et al. v. *Sweetland,* 94 F. 2d. 33 (C. C. A. 4th, 1938);

Seeley et al. v. *Cornell et al.,* 74 F. 2d. 353 (C. C. A. 5th, 1935);

Atwood et al. v. *National Bank of Lima,* 115 F. 2d. 861, (C. C. A. 6th, 1940);

Williams v. *Crabb et al.,* 117 Fed. 193, 40 L. R. A. 125, (C. C. A. 7th, 1902);

Texas Company v. *Wall,* 107 F. 2d. 45, 50 (C. C. A. 7th, 1939);

D. Korwin v. *First National Bank of Chicago, et al.,* 156 F. 2d. 858 (C. C. A. 7th, 1946).

3. The decision of the Circuit Court of Appeals in the instant case conflicts with the following decisions of the State of Alabama upon an important question of local law, and the decision is also grounded upon a misconception of the holding in these cases:

Trotter v. *Brown,* 232 Ala. 147, 150, 167 So. 310;
Ex parte Baker, 118 Ala. 185, 191, 23 So. 996;
Costephens et al. v. *Dean, et al.,* 69 Ala. 385;
Dugger v. *Tayloe,* 60 Ala. 504;
Faulk v. *Money,* 236 Ala. 69, 181 So. 256.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket, No. 12,483, Rowland W. Young, appellant v. Noble C. Powell, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and the judgment herein of the said United States Circuit Court of Appeals for the Fifth Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated —— ——, 1950.

NOBLE C. POWELL,
By HILL, HILL, WHITING & HARRIS AND JOHN O. HARRIS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 688

NOBLE C. POWELL,

Petitioner,

vs.

ROWLAND W. YOUNG,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion in the United States Circuit Court of Appeals for the Fifth Circuit is not reported, but was rendered by said Court on January 10, 1950, and is found on pages 495-504 of the record herein.

Jurisdiction

The statutory provision which is believed to sustain jurisdiction of this Court is Title 28, U. S. Code, Section 1254 (28 U. S. C. A. Section 347).

Statement of the Case

This has already been stated in the preceding petition under the *Summary Statement of Matter Involved* (pp — 2-4), which is hereby adopted and made a part of this brief.

Specification of Errors

1. The United States Court of Appeals for the Fifth Circuit erred in holding that petitioner, one of several legatees, did not have the right, without joining as plaintiffs the other legatees and a representative of the estate, to sue alone to set aside certain gifts of personalty and a deed to realty done and made by decedent to the respondent herein, who is the personal representative of the deceased donor's estate.

2. The United States Court of Appeals for the Fifth Circuit erred in holding that petitioner was not the proper party plaintiff to prosecute an action to set aside gifts of personalty and a deed to realty and in holding that such action could only be prosecuted in the name of the personal representative of the deceased donor's estate.

ARGUMENT

Summary of Argument

POINT A.

Federal Court has jurisdiction based on diversity of citizenship, jurisdictional amount being present, notwithstanding omission of parties, if the court can do justice between the parties before it without injuriously affecting the rights of such absent parties. The "indispensability of parties" in Federal Courts is determined by Federal rules.

POINT B.

State procedure cannct affect substantive rights in Federal Courts and a state statute requiring action to be prose-

cuted in the name of the real party in interest is not binding on Federal Court.

Point A

The rule as to indispensability of parties must be determined by Federal rather than local rules.

In *Payne* v. *Hook,* 74 U. S. (17 Wall.) 425, 19 L. Ed. 260, this Court said:

> "The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the union."

And then the court went on to say:

> "But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree and do justice to the parties before it, without injury to absent parties, equally interested in the litigation, but who cannot conveniently be made parties to the suit.
>
> "The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever."

To like effect is the holding in *Horn* v. *Lockhart,* 84 U. S. (17 Wall.) 570, 21 L. Ed. 657.

In *Waterman* v. *Canal-Louisiana Bank and Trust Co.,*

et al., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80, this court said:

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court, without injuriously affecting the rights of such absent party.
>
> "If the court can do justice to the parties before it without injuring absent parties, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent parties."

In *Williams* v. *Crabb*, 117 Fed. 193, 40 L. R. A. 125, (C. C. A. 7th, 1902), the United States Court of Appeals for the Seventh Circuit, in dealing with the indispensability of parties in an action to set aside a will because of fraud and to set aside and cancel a deed because of undue influence, said:

> "Nor can the objection prevail that Helen Alexander is not made a party defendant or a party complainant with her brother, having an equal interest in the estate of her sister with the complainant. She is not an indispensable party. The ground of demurrer is that she was not made a defendant, but she has no interest adverse to that of the complainant, and so should not be made a defendant. It is not objected that she is not made a co-complainant. She would have been a proper party complainant, and possibly a necessary, as distinguished from an indispensable party. (Citing cases.) By the original bill Helen Alexander was made a party defendant, and she was alleged to be a citizen of Illinois. In the amended bill she was not made a party, nor is there any allegation as to her citizenship, but the demurrer alleges that she is a citizen of Illinois.

> The briefs of both sides concede that she is a citizen of the same state with the defendants, and we think the court may assume that to be the fact; so that if she were made a party, the requisite citizenship to give the federal court jurisdiction would be wanting, as the court would, in determining the question of jurisdiction, arrange the parties according to their interests in the controversy, and, her interests being with the the complainant, she would be placed on that side, which would deprive the court of jurisdiction, as one of the complainants in that case would be a citizen of the same state with the defendants. It seems clear that under the adjudications that would be a good reason that the court would not require her to be brought in. * * *"

In *Oxley et al.* v. *Sweetland,* 94 F. 2d. 33 (C. C. A. 4th, 1938), the United States Court of Appeals for the Fourth Circuit, in treating the indispensability party question, said:

> "Where no interests of the absent parties will be determined by the suit and no action can be taken by the court which will make a determination in their favor contrary to equity and good conscience, there is no reason why the court should not proceed to determine the rights of the parties before it, even though in doing so it may decide questions of fact or law in which absent parties are interested. If this were not true, every person having any interest in the determination of a question of law or fact would be an indispensable party to every suit in which such question might be brought in issue, a manifest absurdity."

Like holdings were pronounced in the following cases:

Seeley et al. v. *Cornell et al.,* 74 F. 2d. 353, (C. C. A. 5th, 1935;

Atwood et al. v. *National Bank of Lima,* 115 F. 2d. 861, (C. C. A. 6th, 1940);

Texas Company v. *Wall, et al.*, 107 F. 2d. 45, 50, (C. C. A. 7th, 1939).

Point B

State procedure cannot affect substantive rights in Federal Courts and a state statute requiring actions to be prosecuted in the name of the real party in interest is not binding on Federal Courts.

The general rule is that the personal representative is the only one authorized by law to sue on a claim relating to personal property belonging to an estate. This rule has application only to actions against third persons who are indebted to the estate. This rule has no application to an action, as here, by a legatee against one who happens to be the personal representative of an estate for his delicts.

The only matter involved in this litigation as between petitioner and respondent is the restoration of the corpus of the estate in which both are legatees, and the establishment of petitioner's quantum in the replaced assets upon final settlement in the Probate Court of Lowndes County, Alabama, under the terms and and provisions of the will, after the payment of all charges and expenses of administration.

In *Ross* v. *Beacham,* 33 F. Supp. 3, the court said:

> "Where diversity of citizenship exists and the requisite amount is in controversy, the Supreme Court has sustained the right of Federal Courts of Chancery to exercise original jurisdiction in favor of creditors, legatees and heirs to establish their claims and have a proper execution of the trust as to them. The only qualification in the application of this principle is that the courts of the United States in the exercise of their jurisdiction over the parties cannot seize or control property while in custody of a court of the state. This exception does not apply in the instant case. Diversity of citizenship and jurisdictional amount are present in this case, and this court has jurisdiction of the con-

troversy. Sutton *v.* English, 246 U. S. 199, 38 S. Ct. 254, 62 L. Ed. 664; Waterman *v.* Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80; Borer *v.* Chapman, 119 U. S. 587, 7 S. Ct. 342, 30 L. Ed. 532; Dixon, as Receiver, etc. *v.* Cleveland, as Executrix, etc. D. C. S. C., 31 F. Supp. 1010."

The distinction was clearly pointed out in *Small* v. *Frick,* D. C. S. C., 40 F. Supp. 778, which was a suit by the heirs at law against a third person for profits due the estate and the court held that the action belonged solely to the personal representative, but went on to say:

> "This conclusion in no wise conflicts with the decision in Ross *v.* Beacham, D. C., 33 F. Supp. 3, in which case the heirs brought suit against the administrator for his delicts. If, with an existing administrator of the estate of W. G. Ross, the heirs in Ross *v.* Beacham had been undertaking to sue *a third party* to collect debts due the estate of W. G. Ross, it would necessarily have been held that they did not have the right to maintain the action." (Emphasis supplied.)

The local law is the same as that pronounced above.

In the case of *Dugger et al.* v. *Tayloe et al.,* 60 Ala. 517, the Supreme Court of Alabama said:

> "The general rule in a court of equity is, that neither creditors, nor distributees, nor legatees, can maintain a bill against debtors of an estate, to subject debts they may owe to the satisfaction of their demands. There is a want of privity between them and the debtors, and it would introduce confusion in the administration of the assets, and displace the power of the personal representative. There are exceptions to the rule; as where there is collusion between the debtors and the personal representative; or where he is insolvent, and there is just apprehension of loss, if he is permitted to collect them; or, as is said by Chancellor Kent, in Long *v.* Majestre, 1 John. Ch. 306, "where

there is some other special case not exactly defined."—1 Dan. Ch. Pr. 322-24; Story's Eq. Pl. Sections 178, 227, 514."

In the case of *Costephens et al.* v. *Dean et al.*, 69 Ala. 385, the Supreme Court of Alabama said:

"As a general principle, the law recognizes an executor or administrator as the only representative of the personal assets of a decedent. His title to them is exclusive, and whatever may be the lapse of time intervening between the death of the owner and the grant of letters of administration, or letters testamentary, the title relates to the death, and he may maintain suits to reduce them into possession, whether they were at the time of the death, choses in action, or were subsequently taken and converted. 1 Brick Dig. 932, Sections 261-64. In trust he holds them, first for the payment of debts, and secondarily, in cases of intestacy, for distribution to the next of kin, or where they have been bequeathed, for the benefit of legatees. The trusts are charged upon the legal title, and that resides solely and exclusively in the personal representative, until distribution is made, or by an assent to legacies, he may part with it.

"In the subject-matter of a suit involving the personal assets, distributees or legatees have an interest differing only in degree from that of creditors. *In respect to such assets, however, they can not generally sue any other person than the executor or administrator,* because there is a want of all proper privity between them and persons who may have possession, or may have converted them, or when the assets are in the form of debts, between them and the debtors. * * *" (Emphasis supplied.)

To like effect is the holding by the Supreme Court of Alabama in the case of *Faulk* v. *Money et al.*, 236 Ala. 69, 181 So. 256. In all of the Alabama cases cited by the Court of Appeals upon the proposition that the personal representative of the deceased donor's estate was the proper

party plaintiff, with the exception of the case of *Faulk* v. *Money, supra,* deal with actions by heirs, legatees and distributees against *third persons* for debts due the estate but most of these same cases point out the exception to the general rule that only the personal representative of the estate can bring suit. These cases clearly recognize that the heirs, legatees and distributees can sue the executor or administrator in their own names. The statute of Alabama, made so much of in the Circuit Court of Appeals, is Title 61, Section 165, Code of Alabama, 1940, which is as follows:

> "Section 165. When administrator ad litem appointed.—When, in any proceeding in the probate or circuit court, or other court having equity jurisdiction, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or he is interested adversely thereto, it shall be the duty of the court to appoint an administrator ad litem of such estate for the particular proceeding, without bond, whenever the facts rendering such appointment necessary shall appear in the record of such case, or shall be made known to the court by the affidavit of any person interested therein."

It will be seen from a casual reading of the above section that the proceeding must be actually pending before a court is called upon to appoint an administrator ad litem in cases where such an appointment is warranted. The Supreme Court of Alabama in the case of *Ex Parte Baker,* 118 Ala. 185, 23 So. 996, held:

> "An administrator ad litem should not be appointed in the Chancery Court, *in any event,* when the court is competent to render complete justice without incurring the unnecessary, and often very considerable, expense to the estate by such an appointment. It does not appear that there is any necessity for the appointment of such an administrator in this case." (Emphasis supplied.)

In the case of *Trotter* v. *Brown,* 232 Ala. 147, 167 So. 310, the Supreme Court of Alabama said:

> "*If the grantor conveyed the legal title by conveyance,* no administrator is necessary, nor need the estate be represented by administrator ad litem. This was shown in our opinion. *But if the legal title did not pass, the estate of the deceased must be represented in such a suit.* If there is no administrator, the estate may be represented by an administrator ad litem." (Emphasis supplied.)

We respectfully submit that the Circuit Court of Appeals for the Fifth Circuit has misapplied the local law of Alabama to the facts in this case. The gift to the respondent in the sum of $44,000.00 and the deed to the 235 acres of land were not assets of the deceased donor's estate at the time of the filing of the complaint in the United States District Court. Title to the money and title to the deed had passed from the deceased donor to the respondent herein. Therefore, under the law of Alabama, an administrator ad litem could not be appointed and the cause of action properly belonged to petitioner. Until the gift of money and the deed to the land were set aside, they could not be assets of the estate. This fact renders inapt all the Alabama decisions cited by the Court of Appeals in support of the contention that the cause of action belonged to the personal representative and not to petitioner.

Conclusion

We respectfully submit that the United States Court of Appeals for the Fifth Circuit grievously erred in reversing and dismissing this cause of action. In doing so, that court ignored the principles of law announced by this Court in the cases hereinabove cited in the petition and brief and has denied to a citizen of Maryland his constitutional right

to seek redress of his grievances in the United States Courts sitting in Alabama. The decision of the United States Court of Appeals for the Fifth Circuit in the instant case is not only grounded in error upon a misconception of the principles announced by this Court in the cases cited, but the decision is also in conflict with the decisions of several of the other circuits, cited above, which have consistently followed the decisions of this Court. The instant decision is also grounded upon a misconception of the holdings of the Supreme Court of Alabama in dealing with the real party in interest rule.

How any court can say that a gift of money and a deed of gift to land become assets of the deceased donor's estate is beyond our power of comprehension. A gift tax was paid the United States Internal Revenue Department on the $44,000.00 and yet the United States Court of Appeals for the Fifth Circuit held this money was an asset of decedent's estate. Title to the money and title to the land passed from the donor (deceased) to the donee (respondent herein) and neither could be assets of decedent's estate; and under the law of Alabama an administrator ad litem can never be appointed in cases where title has passed.

We respectfully urge this Court to grant the writ of certiorari and review the judgment of the Court of Appeals for the Fifth Circuit to the end that all conflicts as to Federal jurisdiction and ownership of causes of action in cases of this kind will be forever settled.

Respectfully submitted,

HILL, HILL, WHITING &
HARRIS, AND
JOHN O. HARRIS,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

NOBLE C. POWELL,
Petitioner,
vs.
ROWLAND W. YOUNG,
Respondent.
No. 898.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Page

Opinion of court below 1

Statement of the case 1

Summary of argument 3

I. The Circuit Court of Appeals was correct in holding that indispensable parties had not been joined 3

II. The Circuit Court of Appeals was correct in holding that the petitioner had no cause of action, it belonging to the estate 4

Argument 6

I. The Circuit Court of Appeals was correct in holding that indispensable parties had not been joined 6

II. The Circuit Court of Appeals was correct in holding that the petitioner had no cause of action, it belonging to the estate 10

Conclusion 14

Appendix 17

Code of Alabama 1940, Tit. 61, Sec. 165 17

Cases Cited.

Atwood et als. v. National Bank of Lima, 115 F. 2d 861 (C. C. A. 6th, 1940) 4, 10

Brown v. Copeland, 206 Ala. 124, 89 So. 274 (1921) 4, 11

Calcote v. Texas-Pacific Coal & Oil Co., 157 F. 2d 216, 167 A. L. R. 413 n. (C. C. A. 5th, 1946), cert. denied 329 U. S. 782, 67 S. Ct. 205, 91 L. Ed. 671, rehearing denied 329 U S. 830, 67 S. Ct. 356, 91 L. Ed. 704 (1946) 3, 7

Crutcher v. Joyce, 134 F. 2d 809 (C. C. A. 10th, 1943) 3, 4, 6, 11

Horn v. Lockhart, 84 U. S. (17 Wall.) 570, 21 L. Ed. 657 (1873) 4, 9

Hudson v. Newell, 172 F. 2d 848 (C. C. A. 2d, 1949).... 7
Keegan v. Humble Oil Co., 155 F. 2d 971 (C. C. A. 5th, 1946) 3,8
Kentucky Natural Gas Corp. v. Duggins, 165 F. 2d 1011 (C. C. A. 6th, 1948)..... 3,8
Mancil et als. v. Thomas et als., 216 Ala. 623, 114 So. 223 (1927) 4,11
McArthur v. Scott, 113 U. S. 340, 395, 5 S. Ct. 652, 669, 28 L. Ed. 1015, 1032 (1885)..... 3,6
McNutt v. Bland et al., 43 U. S. (2 How.) 9, 11 L. Ed. 159 (1844) 4,11
Oxley v. Sweetland, 94 F. 2d 33 (C. C. A. 4th, 1948)..4,10
Payne v. Hook, 74 U. S. (7 Wall.), 425, 19 L. Ed. 260 (1869) 3,9
Roos v. Texas Co., 23 F. 2d 171, 172 (C. C. A. 2d, 1927) 3,8
Shields v. Barrow, 58 U. S. (17 How.) 130, 15 L. Ed. 158 (1854) 3,8
Simon v. Shaffer, 11 F. Supp. 450 (N. D. Okla., 1935). 4,11
Small v. Frick, 40 F. Supp. 778 (E. D. S. C., 1941) 4, 5, 11, 13
Trotter v. Brown, 232 Ala. 147, 150, 167 So. 310 (1936) 14
Waterman v. Canal-Louisiana Bank & Tr. Co. et al., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909)..... 4,9
Williams v. Crabb et al., 117 F. 193, 50 L. R. A. 125 (C. C. A. 7th, 1902).....4, 9, 10
Young v. Powell, 179 F. 2d 147..... 1

Textbook Cited.

3 Moore's Federal Practice (2d Ed.):
Pp. 1303 and 1334.....4,11
Pp. 1365-66 11

Statute Cited.

Code of Alabama, 1940, Tit. 61, Sec. 165.....9,17

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

NOBLE C. POWELL,	Petitioner,	No. 688.
vs.		
ROWLAND W. YOUNG,	Respondent.	

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion in the United States Circuit Court of Appeals for the Fifth Circuit is now reported as **Young v. Powell**, 179 F. 2d 147.

STATEMENT OF THE CASE.

This case is one in which a citizen of Maryland seeks to enforce a cause of action on behalf of an estate being administered in the Court of Alabama. He brought his suit against an Alabama citizen, the donee of gifts made

by the decedent, seeking a decree that the gifts were invalid in their entirety, and asking that the donee be ordered to pour the proceeds of the gifts into the estate to be distributed according to the terms of the will. The petitioner who filed this suit is a residuary legatee of the estate. The estate, and persons who claim through it, had no representation in the suit; neither heirs, the other legatees, nor any personal representative of the estate, nor creditors.

Petitioner does not point out in his statement of the case that he also prayed in his bill for an accounting by the respondent to be made to the petitioner individually (R. 9, 10).

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals Was Correct in Holding That Indispensable Parties Had Not Been Joined.

Other legatees of the estate were indispensable parties, and since some of them were residents of Alabama, diversity of citizenship was destroyed and there was no federal jurisdiction.

McArthur v. Scott, 113 U. S. 340, 395, 5 S. Ct. 652, 669, 28 L. Ed. 1015, 1032 (1885);

Crutcher v. Joyce, 134 F. 2d 809 (C. C. A. 10th, 1943);

Calcote v. Texas-Pacific Coal & Oil Co., 157 F. 2d 216, 167 A. L. R. 413 n. (C. C. A. 5th, 1946), cert. denied 329 U. S. 782, 67 S. Ct. 205, 91 L. Ed. 671, rehearing denied 329 U. S. 830, 67 S. Ct. 356, 91 L. Ed. 704 (1946);

Keegan v. Humble Oil Co., 155 F. 2d 971 (C. C. A. 5th, 1946);

Kentucky Natural Gas Corp. v. Duggins, 165 F. 2d 1011 (C. C. A. 6th, 1948);

Shields v. Barrow, 58 U. S. (17 How.) 130, 15 L. Ed. 158 (1854);

Roos v. Texas Co., 23 F. 2d 171, 172 (C. C. A. 2d, 1927).

Cases relied on by the petitioner are not authority for the case at bar, for they involve suits by an individual in his own right, seeking relief for himself, usually against a personal representative of an estate for a fractional distributive share of assets held by him as fiduciary.

Payne v. Hook, 74 U. S. (7 Wall.) 425, 19 L. Ed. 260 (1869);

Horn v. Lockhart, 84 U. S. (17 Wall.) 570, 21 L. Ed. 657 (1873);
Waterman v. Canal-Louisiana Bank & Tr. Co. et al., 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80 (1909);
Williams v. Crabb et al., 117 F. 193, 50 L. R. A. 125 (C. C. A. 7th, 1902);
Oxley v. Sweetland, 94 F. 2d 33 (C. C. A. 4th, 1948);
Atwood et als. v. National Bank of Lima, 115 F. 2d 861 (C. C. A. 6th, 1940).

II.

The Circuit Court of Appeals Was Correct in Holding That the Petitioner Had No Cause of Action, It Belonging to the Estate.

Executors and administrators are real parties in interest, the legal title to personalty is vested in them, and those for whom they act can bring no suits against third persons indebted to the estate, or for an accounting.

McNutt v. Bland et al., 43 U. S. (2 How.) 9, 11 L. Ed. 159 (1844);
Small v. Frick, 40 F. Supp. 778 (E. D. S. C., 1941);
Crutcher v. Joyce, 134 F. 2nd 809 (C. C. A. 10th, 1943);
Simon v. Shaffer, 11 F. Supp. 450 (N. D. Okla., 1935);
Mancil et als. v. Thomas et als., 216 Ala. 623, 114 So. 223 (1927);
Brown v. Copeland, 206 Ala. 124, 89 So. 274 (1921).

Federal Rule of Civil Procedure 17 (a) covers this case, and it is a restatement of traditional equity practice.

3 Moore's Federal Practice (2d Ed.), pp. 1303 and 1334.

Petitioner acknowledges that the above is the general rule but attempts to take the present case out of the rule

by contending that it is not applicable where the action is by a legatee against a personal representative.

Petitioner's Brief, p. 14.

But respondent was not sued as personal representative. Respondent has throughout insisted that a personal representative of the estate had to be joined as an indispensable party, but petitioner has fought this contention.

Petitioner's Brief, p. 2.

The case of **Small v. Frick**, supra, is in point, indicating that a claim against one who holds assets received from a decedent and sought by his estate, and for an accounting, must be brought by the personal representative.

A cause of action seeking return of assets to an estate is a chose in action belonging to that estate.

Small v. Frick, supra.

ARGUMENT.

I.

The Circuit Court of Appeals Was Correct in Holding That Indispensable Parties Had Not Been Joined.

Three of the express legatees and two other residuary legatees are citizens of Alabama. They were indispensable parties, and had they been properly joined diversity of citizenship would have been destroyed, since the respondent is also a citizen of Alabama. The complete diversity required for federal jurisdiction would no longer have existed.

The general rule has long been that in suits affecting the rights of residuary legatees or next of kin all members of a class must be made parties.

McArthur v. Scott, 113 U. S. 340, 395, 5 S. Ct. 652, 669, 28 L. ed. 1015, 1032 (1885).

More specifically, one heir may sue a third party for an accounting where the estate has been closed, but other heirs are indispensable parties (note that in the present case one legatee sought an accounting from a third party when the estate was still open, and still did not join other legatees).

Crutcher v. Joyce, 134 F. 2d 809 (C. C. A. 10th, 1943).

Petitioner has sought enforcement of an indivisible right on behalf of all the estate. The Circuit Court of Appeals recognized this in its decision (R. 501):

> "No case is cited to us, we have found none, where, as here, one legatee has been allowed to maintain a

suit, in behalf of the estate and all the legatees, to cancel completely in their interest, acts and instruments done and executed by the decedent, and, upon cancellation, to recover the entire property for the benefit of the estate."

And at R. p. 503:

> "The very frame of the complaint, of the prayer, and of the judgment on it, is conclusive of the non-individual, the joint nature of the suit and of the relief demanded, and that plaintiff was without right to maintain the suit."

In considering the question of indispensability of absent parties, there always has been careful differentiation between suits involving a fractional or individual interest and those to cancel or set aside instruments or acts as to all concerned, and to gain relief on behalf of all. Petitioner has filed a suit of the latter nature but relies on authorities relating to the former type. The Fifth Circuit Court took this up in detail in its decision, especially discussing **Hudson v. Newell**, 172 F. 2d 848 (C. C. A. 2d, 1949), wherein it had been held that cancellation of deeds could not be decreed unless every person interested under them was before the Court. Certainly, petitioner cannot seriously contend that he is the only person interested in cancellation of the deed and gift here in question—the other legatees, the personal representative of the estate, the creditors, all are interested. None were joined.

In many cases it has been held that all persons holding fractional royalty interests or sub-leases of oil or gas or mineral leases are indispensable parties to actions to cancel the interests or leases.

Calcote v. Texas-Pacific Coal & Oil Co., 157 F. 2d 216, 167 A. L. R. 413 n. (C. C. A. 5th, 1946), cert. de-

nied 329 U. S. 782, 67 S. Ct. 205, 91 L. ed. 671; rehearing denied 329 U. S. 830, 67 S. Ct. 356, 91 L. ed. 704 (1946);

Keegan v. Humble Oil Co., 155 F. 2d 971 (C. C. A. 5th, 1946).

The Sixth Circuit Court of Appeals has held that in a suit by one heir to cancel or rescind a lease executed by the ancestor, or the ancestor's representative, the remaining heirs are indispensable.

Kentucky Natural Gas Corp. v. Duggins, 165 F. 2d 1011 (C. C. A. 6th, 1948).

It had been contended in that case that other heirs need not be joined because of the rule that one tenant in common may sue in ejectment to recover his interest in land without joining other tenants. In answering this the Court pointed out at 165 F. 2d 1016 the same distinction noted by the Fifth Circuit Court in the present case, that is, the difference between the individual suit for one's aliquot share, such as the tenant in common seeking his share of land, and the suit to enforce an indivisible and undivided right, such as the cancellation of an ancestor's lease. The petitioner here has never given a rational explanation of why he believes one legatee, with all of the others excluded, can sue to cancel a deed and a gift, while all must be joined to cancel a lease.

Similarly, rescission of a contract is generally not permitted unless all parties are joined. Nor can a contract be declared invalid as to some of the parties to it but not as to others.

Shields v. Barrow, 58 U. S. (17 How.) 130, 15 L. ed. 158 (1854);

Roos v. Texas Co., 23 F. 2d 171, 172 (C. C. A. 2d, 1927).

Petitioner discusses in his brief the Alabama statute dealing with appointment of an administrator ad litem, referring to it as the "Statute made so much of in the Circuit Court of Appeals."

> **Petitioner's Brief,** pp. 17-18;
> Tit. 61, Sec. 165, **Code of Alabama 1940.**

Actually, the Court referred to this statute in connection with one of respondent's contentions (R. 499), but does not base its decision upon this contention or even refer to the statute any further.

Before the Circuit Court the petitioner relied upon the same type case as he does here as authority that he may sue alone, but, as that Court pointed out, they are not in point (R. 501):

> "The cases appellee cites in support of his view, that he may sue alone, are not in point on their facts here. They are all cases where plaintiff sued, not for the benefit of others but for himself, to recover for himself his separate and divisible share. He was not enforcing an indivisible right of an estate or of his co-heirs. Those cases did not hold that a court could proceed in the absence of indispensable parties. They held that because of the separate and divisible nature of the plaintiff's demand in the particular case and the fact that the relief sought could not, and did not, affect the rights or liabilities of those not made parties, the cause could proceed to judgment and the relief sought could be granted, without their presence."

Payne v. Hook, 74 U. S. (7 Wall.) 425, 19 L. ed. 260 (1869); **Horn v. Lockhart,** 84 U. S. (17 Wall.) 570, 21 L. ed. 657 (1873); **Waterman v. Canal-Louisiana Bank & Tr. Co. et al.,** 215 U. S. 33, 30 S. Ct. 10, 54 L. ed. 80 (1909); **Williams v.**

Crabb et al., 117 Fed. 193, 50 L. R. A. 125 (C. C. A. 7th, 1902); **Oxley v. Sweetland**, 94 F. 2d 33 (C. C. A. 4th, 1938); **Atwood et als. v. National Bank of Lima**, 115 F. 2d 861 (C. C. A. 6th, 1940), all involved suits by an individual in his own right, seeking relief to himself, usually in the form of a suit against the personal representative of the estate for a fractional distributive share of assets held by him. None of these cases are authority that before an estate is settled one legatee can sue an alleged debtor of the estate, to enforce an alleged cause of action belonging to the estate, asking relief on behalf of the estate, while at the same time seeking an accounting to be made to him individually by a defendant who owes him no fiduciary obligation, with neither other legatees, nor any representative of the estate, nor any representative of the creditors of the estate being parties to the suit. As the Circuit Court states, petitioner has not cited any case indicating that a legatee has such a right.

II.

The Circuit Court of Appeals Was Correct in Holding That the Petitioner Had No Cause of Action, It Belonging to the Estate.

The Circuit Court of Appeals dealt unequivocally with petitioner's attempt to get around the real party in interest rules. Petitioner raised as his first contention there that a state rule requiring the real party in interest to sue is not binding on a federal court. The Court answered (R. 500):

> "We find ourselves in complete disagreement with appellee. The first proposition disregards the fact that Rule 17 (a) of the Federal Rules of Civil Procedure, Real Party in Interest, 'Every question shall

be prosecuted in the name of the real party in interest' is the substantial equivalent of the rule in Alabama and in most of the states."

It is fundamental law in Alabama, and almost everywhere else too, that executors and administrators are real parties in interest, the legal title to personalty is vested in them, and those for whom they act can bring no suits against third persons indebted to the estate, or for an accounting.

McNutt v. Bland et al., 43 U. S. (2 How.) 9, 11 L. ed. 159 (1844);
Small v. Frick, 40 F. Supp. 778 (E. D. S. C., 1941);
Crutcher v. Joyce, 134 F. 2d 809 (C. C. A. 10th, 1943);
Simon v. Shaffer, 11 F. Supp. 450 (N. D. Okla., 1935);
Mancill et als. v. Thomas et als., 216 Ala. 623, 114 So. 223 (1927);
Brown v. Copeland, 206 Ala. 124, 89 So. 274 (1921).

Rule 17 (a) was derived from Federal Equity Rule 37, which was a mere restatement of traditional equity practice, and effected no procedural changes.

3 Moore's **Federal Practice** (2d ed.), pp. 1303 and 1334.

The general introductory statement of Rule 17 (a), that every action shall be prosecuted in the name of the real party in interest, is followed by certain enumerated persons, including executors and administrators. The general interpretation of this has been that the enumeration is not an exception to the general rule but merely illustrative.

3 Moore's **Federal Practice** (2d ed.), pp. 1365-66.

Actually, petitioner concedes that the above law is correct, for he states (Petitioner's Brief, p. 14):

> "The general rule is that the personal representative is the only one authorized by law to sue on a claim relating to personal property belonging to an estate."

Then he attempts to escape the impact of the law by saying:

> "This rule has application only to actions against third persons who are indebted to the estate. This rule has no application to an action, as here, by a legatee against one who happens to be the personal representative of an estate for his delicts."

This argument winks at the facts (and it was raised before th Circuit Court without success), for the present suit **is** an "action against a third person who is indebted to the estate," and it **is not** an "action by a legatee against a personal representative of the estate for his delicts." Respondent received the gifts as an individual, held them as an individual, and was here sued as an individual. The caption of the case so reveals, and the whole tenor of the bill is directed against respondent as an individual donee. In fact, petitioner so acknowledged (Petitioner's Brief, p. 2):

> "The respondent is also the donee and the personal representative, but he was not sued in his representative capacity."

As a matter of fact, the last thing which petitioner has desired is for the personal representative to be in this case; almost since the suit was filed respondent has been strenuously contending that it was indispensable for some personal representative of the estate to be joined, that the case could not properly proceed without the estate's being represented (R. 21, 22), but the petitioner fought this tooth

and toenail because he feared that an administrator ad litem, or a new personal representative, who was a citizen of Alabama, would be joined, diversity of citizenship would be destroyed, and he would be out of federal court. Now he tells this Honorable Court that Rowland Young, in his capacity as personal representative, has been in the case all along! This simply is not true.

One of the clearest cases on the point is **Small v. Frick**, supra. Heirs at law sued, alleging that the defendant had obtained and occupied decedent's farm and received support from it and had received funds as committee for the decedent, who had been adjudged insane. An accounting was sought on both of these claims. The executor was not joined. The court held that the claims were choses in action of the estate, and that the heirs could have no relief because the executor alone could sue for an accounting of anything due to the estate. Joinder of the executor destroyed diversity of citizenship, so the case was dismissed. As petitioner points out in his brief, p. 15, the court distinguished the suit by an heir against the administrator for his delicts from the suit by an heir against a third party to collect debts due the estate with an existing administrator of the estate omitted.

There is no substance to petitioner's argument that the Circuit Court erred in saying that the $44,000 and the deed to the land were not assets of the estate because title had passed to the respondent. In the first place, the Circuit Court of Appeals did not state that the money and the land were assets of the estate or even discuss the point. Passing that point, even if title passed to the respondent, the cause of action seeking return of them was a chose belonging to the estate, and as such was one of its most valuable assets.

Small v. Frick, supra.

Petitioner's argument about an administrator ad litem will not be answered here at length, since the decision of the Circuit Court did not rest on the necessity for appointment of such representative of the estate to appear in the suit. But since the point has been raised, along with the argument that title to the money and property had passed to respondent, it should be noted that **Trotter v. Brown**, 232 Ala. 147, 150, 167 So. 310 (1936), upon which petitioner relies, is not in point, it involving an attempt by an administratrix to file a creditor's bill to set aside a conveyance alleged to have been fraudulently made by the decedent. The Alabama Supreme Court held that one in a representative capacity had no right to maintain such a bill and pointed out that the suit was not for the benefit of the decedent's estate, directly or indirectly, but merely a matter between a creditor and an alleged fraudulent transferee. That is not this case, where the very nature of the bill is to benefit the estate.

CONCLUSION.

We respectfully submit that the sound decision of the Circuit Court of Appeals for the Fifth Circuit correctly sets out the law, both on the holding that indispensable parties were not joined and the holding that petitioner had no cause of action.

The petition for writ of certiorari sets out four alleged reasons why the writ should be granted. The first two are, in substance, that the decision is in conflict with decisions of this Honorable Court and of other Circuit Courts of Appeal. Careful analysis of the cases to which petitioner refers shows that they are not in point, for they deal with enforcement of separate and divisible rights on behalf of an individual. The Court of Appeals pointed

this out, and while petitioner cites the same group of cases in Point A of his brief, he makes no attempt to meet this ruling of the Court or to explain why he thinks it is in error.

The third alleged reason, that the decision is in conflict with Alabama law, is directed at the point that the estate rather than the petitioner is the owner of the cause of action and only the personal representative can sue. Petitioner attempts to answer the Court of Appeals ruling on this point. He acknowledges that he is barred by the general real party in interest rule but attempts to escape it by citation of cases relating to suits by a legatee or heir against a personal representative in his fiduciary capacity. This is not such a suit, and petitioner knows it. Young, as an individual, was defendant, but Young, as executor, was carefully and intentionally omitted as defendant, and petitioner bitterly fought in the District Court the contention of respondent that a representative of the estate ought to be in the suit, in fact was an indispensable party.

This suit is no more than an officious intervention by a legatee into the affairs of an estate being administered by duly empowered courts of the State of Alabama. Reduced to simple terms, he seeks to enforce a cause belonging to the estate against one alleged to be indebted to it. If petitioner objects to actions of the personal representative the law of Alabama provides orderly and full procedure for his protection. But he cannot officiously take into his own hands the marshalling of assets, and make of the federal court a probate court merely because he and the alleged debtor are citizens of different states.

We respectfully say: that the Fifth Circuit Court of Appeals was correct in holding that (1) petitioner had no cause of action at all, and (2) even if he did have a right

to sue, he failed to join indispensable parties; that petitioner shows no reasons for granting of a writ of certiorari.

Respectfully submitted,

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APPENDIX.

"Sec. 165. **When Administrator ad litem appointed.**—When, in any proceeding in the probate or circuit court, or other court having equity jurisdiction, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or he is interested adversely thereto, it shall be the duty of the court to appoint an administrator ad litem of such estate for the particular proceeding, without bond, whenever the facts rendering such appointment necessary shall appear in the record of such case, or shall be made known to the court by the affidavit of any person interested therein."

INDEX

	Page
Where the Circuit Court of Appeals has rendered a decision in confiict with the decision of another Circuit Court of Appeals on the same matter, the Supreme Court should grant certiorari to settle the conflict	1
Conclusion	5

Cases Cited

Calcote v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216	5
De Korwin v. *First National Bank of Chicago*, 179 F. 2d 347 (C. C. A. 7th, 1949)	1
Sadler v. *Sadler*, 167 F. 2d 1 (C. C. A. 9th, 1948)	1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 688

NOBLE C. POWELL,

Petitioner,

vs.

ROWLAND W. YOUNG,

Respondent

REPLY BRIEF OF PETITIONER

Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, the Supreme Court should grant certiorari to settle the conflict.

The purpose of this reply brief is to bring to the attention of this Court two decisions rendered by the United States Circuit Court of Appeals for the Seventh and Ninth Circuits, respectively, which have not heretofore been cited. Both of these cases are in conflict with the holding of the United States Circuit Court of Appeals for the Fifth Circuit in the present case upon an identical subject-matter. The cases are:

Sadler v. *Sadler,* 167 F. 2d. 1, (C. C. A. 9th, 1948);

De Korwin v. *First National Bank of Chicago,* 179 F. 2d 347 (C. C. A. 7th, 1949).

In the *Sadler* case, *supra*, plaintiff a citizen of California, brought suit in the District Court of Nevada against Edgar Sadler and the administratrix of the estate of Alfred Sadler, citizens of Nevada, seeking to have defendant declared trustee of certain real and personal property located in Nevada and for an accounting. Suit was dismissed as to the administratrix. The jurisdictional amount was admitted. Judgment was in favor of plaintiff. The defendant (appellant) contended that the Court was without jurisdiction because three of the heirs and the *legal representative* of two deceased heirs were not joined as parties. In disposing of this contention the Circuit Court of Appeals said:

> "We do not agree. The interests of the beneficiaries are not joint. That one or more beneficiaries may have a trust declared in his or their favor as well as in favor of persons not parties does not make the absent persons indispensable or even necessary parties. The complaint sought and the court found nothing adverse to them. Cf. Federal Rules of Civil Procedure, Rule 19, 28 U. S. C. A. following Section 723c; Atwood *v.* National Bank of Lima, 6 Cir., 115 F. 2d. 861, 863.
>
> "The quantum of the interest of the absent parties in the estate of the trust in their favor presents another question, as shown by the several cases cited by appellant. However, that question was reserved by court's judgment, no doubt until all the heirs are made parties or until compliance with Rule 19. Here the judgment was so framed that the interests of the absent beneficiaries are protected. Payne *v.* Hook, 7 Wall. 425, 431, 19 L. Ed. 260; Waterman *v.* Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 49, 30 S. Ct. 10, 54 L. Ed. 80."

The judgment was affirmed.

The District Court in the *Sadler* case, 73 F. Supp. 583, following the suggestion of this court in *Payne* v. *Hook*,

7 Wall. 425, 19 L. Ed. 260, retained jurisdiction of the action to hear, consider and determine applications on the part of beneficiaries other than the plaintiff to share in the trust property.

The District Court in the present case likewise followed the suggestion of this court in *Payne* v. *Hook, supra,* in ordering the respondent Young to account to and pay to the estate of Sarah Irvin Low, deceased, now pending in the Probate Court of Lowndes County, Alabama, the said sum of $44,000.00 for distribution in accordance with the provisions of the last will and testament of said decedent, and in divesting title to the land out of respondent Young and making the land a part of the estate to pass under the terms of the said will. The District Court retained jurisdiction over the cause until restitution of the $44,000.00 was made in conformity with the decree (R. pp. 486-488).

The decree of the District Court in the *Sadler* case and the decree of the District Court in the present case are identical in substance—both following the suggestion in *Payne* v. *Hook, supra.* The United States Circuit Court of Appeals for the Ninth Circuit affirmed the judgment in the *Sadler* case, (167 F. 2d 1) but the Circuit Court of Appeals for the Fifth Circuit reversed the judgment in the present case and dismissed the cause out of court (179 F. 2d 147).

There is a glaring conflict between the Ninth and Fifth Circuit Courts of Appeals upon an identical subject matter, which ought to be settled by this court.

The *De Korwin* v. *First National Bank of Chicago* case, *supra,* has a judicial history and in certain aspects is indistinguishable from the present case. The jurisdictional question was raised and disposed of in the first decision reported in 156 F. 2d 858. In the second case, 179 F. 2d 347, the question of indispensable parties, similar to the question in the present case, was raised and settled.

In the *De Korwin* case the plaintiff had an interest in the estate of a deceased beneficiary of a trust and claimed that under a proper interpretation of the trust instrument (a will) the estate had an interest in the trust because the deceased beneficiary had a vested interest. The other persons interested in the estate of the deceased beneficiary were not made parties (their presence would have destroyed diversity jurisdiction). There is, moreover, a particular similarity between the decree of the District Judge in the *De Korwin* case and the decree in the present case because the District Judge in the *De Korwin* case, after decreeing that the entire class of beneficiaries had vested interests and that the plaintiff, as heir of one deceased beneficiary, had a vested interest and was *entitled to an accounting*, decreed that the court retain jurisdiction, among other things

> "to fix the amount of proportional contributions to plaintiff's counsel out of their remainders from such heirs, legatees and devisees of Otto Young's grandchildren dying without issue before termination of the trust as may accept the benefit of services rendered by plaintiff's counsel in creating and preserving such interests, either by applying for or by receiving their share in the vested estates herein established."

The Court of Appeals for the Seventh Circuit affirmed the decree of the District Court, a part of which, as shown above, specifically extends the benefits to absent parties interested in the estate of the deceased beneficiary and is thus, in effect, like the decree in *Powell* v. *Young*, not merely a decree in favor of the plaintiff but a decree in favor of the estate.

There is, therefore, a glaring conflict between the Seventh and the Fifth Circuit Courts of Appeals upon an identical subject matter, which ought to be settled by this Court.

Conclusion

We respectfully submit that upon every principle of justice and equity petitioner had the right to bring this action against a co-legatee to determine the validity of the gifts made the basis of this action and to return the invalid gifts to the corpus of the estate to be distributed in accordance with the last will and testament of the deceased donor. The respondent could not be a debtor of this estate until a court of competent jurisdiction adjudged the gifts to be invalid.

As to the question of indispensable parties, the framework of the complaint revealed at the outset that no judgment or decree under the averments of the complaint could possibly be rendered that would, *in any way, affect any right, title or interest of the absent parties.* Hence, they could not be, and were not, indispensable parties.

The Judge of the Fifth Circuit Court of Appeals who wrote the decision in this case, in addition to failing to follow the principles announced by the decisions of this court and the decisions of other Circuits cited in the brief in support of the petition for certiorari and the decisions cited in this brief, failed to follow his own holding in the case of *Calcote* v. *Texas Pac. Coal & Oil Co.,* 157 F. 2d 216, wherein he said:

> *"The truth of the matter is that the classification of parties as necessary or indispensable depends entirely upon the particular facts of each case and that the same facts should produce the same holding.* Further, though some of the decisions exhibit more than a little confusion about it, it is undeniable that the error in non-joinder of parties, either necessary or indispensable, is not jurisdictional. *Finally, it is clearly settled that even if a party is indispensable, his absence from a suit will not be ground for dismissing it or*

reversing a judgment in it, if it clearly appears that no relief can be, or has been, obtained in the suit which injuriously affects his interest.'' (Emphasis supplied.)

The decisions of the Court of Appeals for the Fifth Circuit in the present case is in conflict with the principles of law announced by this Court in the cases cited in our original brief, and is in conflict with the holdings of other circuits cited in our original brief and also in this reply brief, and we urge this Court to grant certiorari and settle the conflict.

Respectfully submitted,

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